Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1255

JAMES E. DOUGLASS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., THE NEW SMITH MEAL COMPANY, INC., AND SECOND OCEANIC CORPORATION,

Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

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MOTION TO AFFIRM

The Appellees move the Court to affirm the judgment of the United States District Court for the Eastern District of Virginia on the grounds that the questions presented are so insubstantial as not to need further argument in that the decision below conforms to prior decisions of this Court and involves no more than the application of settled principles of constitutional law to void exclusionary state legislation designed to bar non-residents and foreign-owned corporations from fishing for menhaden in Virginia waters.

Opinion of the Court Below

The order and opinion of the three-judge District Court declaring void §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, and enjoining their enforcement is not

reported. The order and opinion are set forth in the Appendix, *infra,* at p. 32 and p. 33, respectively.

Jurisdiction

Three judges convened under 28 U.S.C. § 2284, granted Appellees' prayer for relief and held two Virginia statutes were unconstitutional. Jurisdiction here by appeal is based on 28 U.S.C. § 1253.

Statutes Involved

The text of the statutes determined to be unconstitutional is set forth in the Appendix at pp. 38-42. Section 28.1-60 of the Code of Virginia in essence prohibits non-residents of Virginia from catching menhaden in the Virginia portion of Chesapeake Bay. Section 28.1-81.1 prohibits a corporation owned by non-citizens of the United States from catching menhaden or any other fish within the three-mile limit of the seacoast of Virginia. Violation of either statute is a misdemeanor.

QUESTIONS PRESENTED

1. Whether enrollment and licensing of menhaden fishing vessels by domestic corporations ultimately owned by non-U.S. citizens, after approval by the Department of Commerce of transfer of such vessels to such corporations, can be nullified by state laws designed to exclude non-residents and non-citizens from competing with instate fishermen?

2. Whether the attempts of the State of Virginia to exclude non-residents from the menhaden fishery of Chesapeake Bay and exclude non-citizens from the menhaden fishery of the Bay and Virginia's marginal seas constitute an unlawful burden on interstate commerce?

3. Whether corporations incorporated and resident in States outside the State of Virginia, ultimately owned by

non-U.S. citizens, the vessels of which are duly enrolled in the U.S. fishery in accordance with approval by the Department of Commerce, are deprived of the equal protection of the laws within the Fourteenth Amendment by exclusionary Virginia statutes which bar non-residents and foreign-owned corporations from fishing for menhaden in Virginia waters?

4. Whether the Federal doctrine of abstention is applicable where state statutes challenged as unconstitutional admit of no saving construction by state courts and the enforcement thereof would cause immediate and irreparable injury?

STATEMENT OF THE CASE

On July 14, 1975 the Appellees filed in the District Court below a Complaint requesting that a three-judge court be convened pursuant to 28 U.S.C. § 2284 to declare §§ 28.1-60 and 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional and to enjoin the Appellant from enforcement of said statutes. By order entered on November 7, 1975, the District Court granted Appellees' Motion for Summary Judgment, finding both statutes in question unconstitutional and enjoined further enforcement of each statute by the Appellant.

The Appellant, James E. Douglas, Jr., is the Commissioner of Marine Resources for the Commonwealth of Virginia and is charged with responsibility for enforcement of Virginia's statutes regulating commercial fisheries. § 28.1-13, Code of Virginia (1950), as amended.

Appellees are Seacoast Products, Inc. ("Seacoast"), a Delaware corporation duly qualified to do business in the State of Virginia, and its subsidiaries, The New Smith Meal Company, Inc. ("Smith Meal"), a Massachusetts corporation, and Second Oceanic Corporation ("Oceanic"), a New York corporation, all three entities being engaged in the capture and processing of menhaden for fish oil, meal and solubles.

Seacoast in terms of volume is the second largest menhaden fisher. Its principal competitors, Zapata Haynie Corporation ("Zapata Haynie"), first in volume, and Standard Products, Inc. ("Standard Products"), third, have menhaden operations based in Virginia.

The operations of Seacoast were begun in Port Monmouth, New Jersey in 1911 by J. Howard Smith. After his death in the early 1950's, ownership of the business passed to his children and a son-in-law ("Smith Family"). The stock of Seacoast was sold by the Smith Family in December 1973 to a Delaware corporation ultimately owned by Hanson Trust Ltd. a publicly held company of the United Kingdom.

Seacoast itself is a Delaware corporation and its operations should not be confused with the case of foreign fishing fleets not subject to the jurisdiction of the United States. Ultimate alien stock ownership of Seacoast in no way affects United States control over the corporation as to any laws or regulations the United States has imposed, or may seek to impose, on domestic corporations and/or on the fishing industry as a whole.

The transfer of ownership of Seacoast from the Smith Family resulted in no change in Seacoast's mode of operations. The officers and crews of its ships are U.S. citizens as are 95% of the employees in its processing plants in various coastal states.

Approval of Seacoast Transfer by the United States Government

The purchase of the Seacoast stock by the British-controlled Delaware corporation required the approval of the Maritime Administration of the Department of Commerce under Section 37(e) of the Shipping Act, 1916 (46 U.S.C. § 835(e)). Section 37(e)* prohibits the transfer to an alien,

* Section 37 applies during a period of national emergency, and therefore has been applicable since the Presidential Proclamation No. 2914 of December 16, 1950, 15 F.R. 9029.

including a foreign-owned domestic corporation, of majority control of any vessel-owning corporation organized in the United States. In order that the stock purchase not be conditioned upon such approval, however, the Seacoast vessels were temporarily transferred to a nominee, Richard Reiss, a citizen of the United States. Approval of the Maritime Administration of the Department of Commerce was then required for the retransfer of the vessels to Seacoast under Section 37 and, in addition, Section 9 of the Shipping Act, 1916 (46 U.S.C. § 808).

The necessary application for approval was submitted in January of 1974. It was specifically stated that the vessels would be redocumented (by enrollment and licensing) as fishing vessels under the laws of the United States.

In passing upon the application, the Maritime Administration considered, among other things, the acceptability of the foreign purchaser and national defense considerations. It would also have considered the acceptability of any change in flag if it had not been proposed to redocument the vessels in the United States. (46 C.F.R. § 221.7 Appendix.) Because the application involved continued operation by an alien controlled domestic corporation, it was forwarded, pursuant to Maritime Administration policy, to the National Oceanic and Atmospheric Administration ("NOAA") for investigation and comment.

NOAA's policy in regard to such transfers is set forth in a public statement dated October 16, 1973, 38 F.R. 29239, and provides in part as follows:

> "Under present law aliens may own controlling interests in U.S. fishing companies operating U.S.-documented fishing vessels. Ownership and control of a U.S. company by foreign interests does not alter the fact that any such company is still a U.S. company and as such is subject to all U.S. laws and regulations. Consequently, the provisions of law relating to, among other things, employment and compensation of alien workers, exports and imports of products, operations

of U.S.-documented fishing vessels, international agreements to which the U.S. is a party, and fishing regulations would apply to foreign-owned U.S. fishing companies.

• • •

NOAA will investigate and evaluate each application on its individual merits with consideration being given to, among other things, the impact of the proposed transaction on (a) conservation and management of the fisheries resources, (b) the employment of U.S. citizens, (c) U.S. consumers, (d) competition, and (e) other social and economic factors. In doing this, NOAA will review and evaluate the operational plans of the company as well as the extent of foreign investment in the particular fishery in which the company plans to operate."

After widespread notice, public hearings, the first of their nature, were held on March 20-21, 1974 and covered the subjects with which NOAA was particularly concerned as set forth in its interim statement of policy aforesaid. At the outset of the hearings, the Chairman outlined the purpose and format of the proceedings:

> " 'As I previously indicated, the focus of this hearing will be on the fishery aspects of the proposed transfer.
>
> We will further address such considerations as the possible effects of the transfer upon (1) the Menhaden resource involved; (2) the aggregate of fishing/processing companies on whose behalf the transfer is sought; (3) upon the Menhaden segment of the commercial fishing industry; and (4) upon consumers of fish meal, fish oil, and fish solubles which these companies have produced.' " Affidavit of David H. Clarke, p. 4.

During the ensuing investigation, statements were offered in support of the application by various representatives of Seacoast and opposing comments were made by its primary competitors, Zapata Haynie and Standard

Products. The hearings on the application to retransfer sixty-eight vessels to Seacoast resulted in a favorable recommendation by NOAA to the Maritime Administration. In so doing, there was the necessary finding that the application was consistent both with protection of the fisheries, one of the paramount concerns set forth by NOAA, and also with the United States social and economic interests.

The Department of Commerce (through the Maritime Administration) granted the application for transfer of the vessels to Seacoast and Smith Meal and their redocumentation as United States fishing vessels, and issued Transfer Orders approving such transfers. The Department in such circumstances is authorized by law, if it grants such approval, to grant it "either absolutely or upon such conditions as the Secretary prescribes." 46 U.S.C. § 839. The approval was granted *unconditionally.*

After the Department of Commerce issued its Transfer Orders approving the transfer of the vessels, the vessels were all redocumented (by enrollment and licensing) as fishing vessels of the United States.

Upon enrollment, they were "deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." 46 U.S.C. § 251(a). As such vessels of the United States, they were entitled to "engage in the fisheries within the territorial waters of the United States." 16 U.S.C. § 1081.

Commercial Menhaden Fishing in the United States

Menhaden is a species of inedible, migratory fin fish which, during their summer migration, remain relatively close to the coastline. Fishing for menhaden is therefore concentrated during this summer migratory period when they are close inshore and travel in large, thickly packed schools. It is not feasible commercially to capture menhaden outside the three mile limit. Thus practically all menhaden are captured within State territorial waters.

From approximately June through October of each year, large quantities of menhaden are found close to shore within the territorial waters of the States located on the Atlantic Ocean. During those months, fishing for menhaden is effected within the territorial waters of the particular State where the fish may appear at the time, whether such State be Virginia or some other state bordering on the Atlantic seaboard.

Menhaden processing results in three products, fish meal, used principally for poultry feed, fish solubles, an ingredient of animal feed, and fish oil, exported primarily to Europe and Canada for use in the manufacture of margarine.

Appellees Seacoast and its subsidiaries, predecessors or affiliates have, over the years, caught substantial amounts of menhaden within the territorial waters of Virginia and in so doing have lawfully applied for and received licenses for such activities from the Commonwealth of Virginia until the enactment of the challenged legislation in 1975.

Virginia Menhaden Legislation

After approval by the Department of Commerce of the transfer of the fishing vessels to Seacoast a Virginia congressman (Hon. Thomas N. Downing) at the request of Seacoast's competitor Zapata Haynie, introduced a bill, H.R. 17048 designed to prevent Seacoast from fishing in all American waters on the grounds that it was foreign owned. After the defeat of this bill, the 1975 Virginia General Assembly passed, without notice, as special "emergency" legislation a statute ultimately embodied in § 28.1-81.1 of the Code of Virginia (1950), as amended, the text of which is found in App. p. 41. The Virginia enactment was introduced in the General Assembly through the efforts of counsel for Zapata Haynie.

It was conceded by Appellant James E. Douglas, Jr., Commissioner of Virginia Marine Resources, who is responsible for enforcing § 28.1-81.1, that at the date of passage of this legislation it affected only the Appellees (Deposition, p. 5), and had no conservational value. Deposition, pp. 24, 27.

Furthermore, Appellant acknowledged that this enactment would not prevent domestic menhaden corporations from engaging in predatory fishing practices. Deposition, pp. 37-38.

On May 22, 1975, Appellee Smith Meal made application to the Virginia Marine Resources Commission for a Virginia menhaden license. By letter dated May 28, 1975 from Mr. Robert V. Hancock, Chief, Law Enforcement Division of said Commission, Smith Meal was informed that such licenses were not available to corporations, such as Smith Meal, controlled directly or indirectly by foreign interests, citing § 28.1-81.1 of the Code of Virginia, as amended.

The Commonwealth of Virginia has for a number of years forbidden *non-resident* fishermen, individual and corporate, from fishing for menhaden within Chesapeake Bay, § 28.1-60(3), Code of Virginia (1950), as amended.

Appellees, by virtue of this statute, are precluded from pursuing menhaden into Chesapeake Bay simply because they are not Virginia corporations and by virtue of their ultimate alien ownership. Again, the practical effect of this legislation is the prevention of menhaden fishing in these waters by only one commercial fisher, Seacoast and subsidiaries, which in turn are the only real competitors of the Virginia menhaden fishing corporations, Zapata Haynie and Standard Products. Deposition of Robert B. Chapoton, p. 23.

Penalties

Violations of Virginia Code § 28.1-60(3) and § 28.1-81.1 constitute misdemeanors under § 28.1-60(6) and § 28.1-187 of such Code, and the Commissioner of Marine Resources, any member of such Commission, all inspectors, police

captains and other employees designated by the Commissioner in the service have the power, with or without warrant, to arrest any person or persons violating any of the fish or shellfish laws, and to seize any vessel, boat, craft, motor vehicle, conveyance or other thing used in such violation. § 28.1-185 Code of Virginia (1950), as amended.

ARGUMENT

I

Introduction

In light of the strenuous efforts of the Appellant and even more the *Amici* to convert this case into a test of conservation measures adopted on behalf of a beleaguered industry to protect an imperiled natural resource against the much publicized depredations of the Russian trawler fleet, some preliminary clarifying remarks seem warranted.

(a) It should be noted at the outset that the Virginia statutes held unconstitutional are not conservation statutes, but rather are clearly designed to protect Virginia based menhaden fishery companies against competition from non-residents and non-citizens in Chesapeake Bay and in the marginal seas out to the three mile limit.

(b) The menhaden supply is not imperiled by foreign vessels. Menhaden can be taken commercially only near the shore when they are in schools or in bays such as the Chesapeake, the Delaware, Long Island Sound and Narragansett. Consequently, foreign flag vessels restricted to activities beyond the territorial limits are not a factor in the domestic menhaden fishery.

(c) For all practical purposes, the harvest of menhaden on the Atlantic and Gulf coasts is dominated by three companies, Zapata Haynie, Standard Products, both having menhaden operations based in Virginia, and Seacoast, a

Delaware corporation with its principal office in New Jersey. Seacoast's subsidiaries, Oceanic and Smith Meal, are New York and Massachusetts corporations, respectively.

The ultimate question presented by this appeal is whether the State of Virginia can lawfully exclude non-residents or non-citizens, as defined by Virginia to include domestic corporations ultimately owned by foreign nationals, using U.S. flag vessels duly enrolled for the U.S. fishery with the approval of the Maritime Administration of the Department of Commerce, from competing in the menhaden fishery in Virginia. In considering this question and the more immediate question of whether this Court should note probable jurisdiction or affirm the decision below, Appellees submit that long settled principles of constitutional law support the following conclusions:

1. The enrollment and licensing of Seacoast's menhaden fishing vessels for the U.S. fisheries after the affirmative action of the Maritime Administration, following a hearing, approving retransfer of such vessels to Seacoast settled the issue of their right to fish in U.S. waters, which right cannot be nullified by state law.

2. The discriminating Virginia statutes challenged imposed an unlawful burden on interstate commerce.

3. The Virginia statutes in dispute deprived Appellees of the Equal Protection of the laws.

4. The doctrine of abstention should not be applied to the issues presented here.

II

The enrollment and licensing of Seacoast's fishing vessels for the United States fisheries after the affirmative action of the Maritime Administration, following a hearing, approving transfer of such vessels to Seacoast

settled the issue of their right to fish in United States waters which right cannot be nullified by state statutes.

A. Federal Statutes Providing for the Licensing of Fishing Vessels Deprive Virginia of the Power to Enact Contrary and Inconsistent Licensing Statutes Based On Residency and Alienage.

Vessels of the United States enrolled and/or licensed for the fisheries, and only such vessels, are entitled to engage in fishing in United States territorial waters. This has been true since the enactment of the Acts of February 18, 1793, now codified as 46 U.S.C. § 251(a), which provides that such vessels "and no others, shall be deemed vessels of the United States entitled to the privileges of vessels employed in the . . . fisheries." The very license (the "Consolidated Certificate of Enrollment and License") issued by the United States Coast Guard to the Seacoast vessels provides (as 46 U.S.C. § 263 requires it to provide) that a "License is hereby granted for the said vessel to be employed in carrying on" a designated fishery (in this case the fishery which includes menhaden). This policy was restated in 16 U.S.C. § 1081 which was enacted in 1964 for the sole purpose of clarifying and enforcing 46 U.S.C. § 251(a). The Report of the House Committee on the Merchant Marine and Fisheries, H.R. Rep. No. 1356, 88th Cong., 2d Sess. (1964); The Report of the Senate Committee on Commerce, S. Rep. No. 500, 88th Cong., 1st Sess. (1963); Section 1081 provides, in part, that:

> "It is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . ."

The Court below held, properly, that Section 1081 invalidated the Virginia statutes involved in this case because they preempted Virginia's power to enact statutes incon-

sistent with or contrary to Section 1081. The Appellant and the *Amici* have attempted to read the Court's decision as claiming that Section 1081 preempts all power of Virginia with respect to fishing in its territorial waters. They then argue that such exaggerated holding is invalid. The Court's holding, however, does not go to any such length and therefore, as will be discussed below, the arguments of the Appellant and the *Amici* are beside the point. In the context of this case the Court's holding below is clear and correct; 16 U.S.C. § 1081 has preempted the power of Virginia and every other State to say that some licensed United States fishing vessels may fish in territorial waters but some may not.

There can be no doubt, and the Court below correctly held, that the Seacoast vessels were entitled to enrollment and licensing for the fisheries. As outlined in the Statement of The Case, United States law requires that before vessels documented in the United States may be transferred to an entity controlled even indirectly by foreign interests, the transfer must be approved by the Department of Commerce with forfeiture of the vessels, fine and/or imprisonment as penalties for non-compliance. 46 U.S.C. §§ 802, 808, 835. As is also outlined in the Statement of The Case, only after an investigation of and public hearings on the impact of the operation of the Seacoast vessels as U.S. flag vessels by a foreign controlled U.S. fishing company, was approval obtained, and such approval was given unconditionally. The vessels were entitled to be and were duly enrolled and licensed as United States fishing vessels, 46 U.S.C. §§ 11, 252.

The *Amici* attempt to denigrate the significance of the Department of Commerce approval by stating in their brief, footnote page 4, that the approval was only of the transfer of title to Seacoast; that it did not pass upon their operation as United States fishing vessels by a foreign controlled company and that in fact, Seacoast, once it re-

ceived approval, could have registered the vessels under some other flag. All of these propositions are untrue. The application to the Maritime Administration was for approval of the transfer of the vessels to Seacoast for operation under United States flag. The consequences of the operation of the vessels under United States flag by a United States fishing company controlled by particular foreign interests was the very substance of the matters considered by the Maritime Administration and the National Oceanic and Atmospheric Administration. Registration of the vessels by Seacoast under the laws of another flag would have been a violation of 46 U.S.C. §§ 808 and 835 and, as stated in the Statement of The Case, application for approval for such registration would have required the Maritime Administration to consider additional and different questions.

The effect of Virginia Code § 28.1-60, denying Appellees a license to pursue menhaden in Chesapeake Bay because of non-residency, and Virginia Code § 28.1-81.1, denying Appellees a license to catch menhaden in Chesapeake Bay or within three miles of Virginia's coastline due to ultimate control of Appellees by an alien corporation, is to nullify the federal approval of the transaction and the enrollment and licensing of these vessels.

If Virginia has such authority, then all the remaining states may do likewise, thereby completely depriving Appellees of the use to which these vessels have always been put.

Such State action is constitutionally impermissible as has been settled since the landmark decision of *Gibbons* v. *Ogden*, 9 Wheat. (22 U.S.) 1 (1824).

See also *Harman* v. *Chicago*, 147 U.S. 396, 406-407 (1893), where this Court concluded,

> "Of course, the [tax] ordinance, if constitutional and operative, has the effect to restrain the use of the vessels in the legitimate commerce for which they are expressly licensed by the United States. It would be a burden and restraint upon that commerce, which is authorized by the United States, and over which Congress has control. No State can interfere with it, or put obstructions upon it, without coming in conflict with the supreme authority of Congress. The requirement that every steam tug, barge or tow-boat, towing vessels or craft for hire in the Chicago River or its branches shall have a license from the city of Chicago, is equivalent to declaring that such vessels shall not enjoy the privileges conferred by the United States, except upon the conditions imposed by the city. This ordinance is, therefore, plainly and palpably in conflict with the exclusive power of Congress to regulate commerce, interstate and foreign."

More recently, this Court noted that " '[n]o State law can hinder or obstruct the free use of a license granted under an act of Congress.' " *Sperry* v. *Florida*, 373 U.S. 379, 385 (1963), citing *Pennsylvania* v. *Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 566 (1851). See also *Moran* v. *New Orleans*, 112 U.S. 69 (1884).

B. Since 16 U.S.C. § 1081 Preempted Only the Power of States to Discriminate among U.S. Flag Fishing Vessels It Did Not Affect Other Powers of States to Enact Non-Discriminatory Fishing Regulations for Their Territorial Waters.

The *Amici* point out that 16 U.S.C. § 1081 provides for an exception to the prohibition against foreign flag vessels fishing in the U.S. territorial waters if the Secretaries of State and Commerce certify that such an exception is in the national interest and if the concurrence is obtained "of any State . . . directly affected." The *Amici* also point to statements in the House and Senate Committee Reports to the effect that 16 U.S.C. § 1081 did not preempt the powers of the States against "trespassers of their territorial waters". From these arguments the *Amici* conclude that Section 1081 was not intended to limit in any way the

powers of the States regarding their territorial waters. The language of Section 1081 and the Committee Reports cannot possibly bear such meaning, however.

Permitting the States to concur, or not, in a relaxation of the ban on foreign flag fishing vessels can hardly be relevant to the affirmative right granted to U.S. fishing vessels. Nor can preserving to the States the power to prohibit "trespassers" be construed to give the States a right to exclude U.S. flag vessels as "trespassers". As the brief of the *Amici* points out, the Committee Reports and Hearings are replete with references to the power of the States to punish "trespassers" in their territorial waters; but such references are in every case references to foreign flag vessels. For this reason the Reports even describe Section 1081 as a "supplement" to State statutes punishing such "trespassers". There is nothing surprising in any of these references and statements, of course, since the whole purpose of Section 1081 was to limit fishing in the U.S. territorial waters to U.S. vessels and to prohibit it to foreign flag vessels.

Finally, the *Amici* argue that Section 1081 could not have been intended to eliminate all state power over the regulation of territorial waters, because it would thereby have repealed large portions of the Submerged Lands Act, 43 U.S.C. § 1301, *et. seq.*, the Contiguous Fisheries Zone Act, 16 U.S.C. § 1091, *et seq.* and the Coastal Zone Management Act, 16 U.S.C. § 1451, *et seq.* Since, however, Section 1081 was not intended to eliminate all State power but only make clear that U.S. vessels can and foreign vessels cannot fish in territorial waters, it, and the holding of the Court below, have no such effect upon such statutes. The States can continue to exercise their rights under such statutes, and can no doubt, for example, enact many kinds of non-discriminatory conservation and regulatory measures such as laws establishing closed seasons or net sizes to be used. What they are not free to do is to discriminate among those U.S. flag vessels which may fish in their waters.

C. Justifications For The Virginia Statutes as Conservation Statutes or as Intended to Close a "Loophole" in Federal Statutes Are Invalid.

Appellant contends, however, that invalidation of federal enrollment and licensing is warranted in that Virginia statutes prevent the destruction of the menhaden fisheries. In the first instance, the discussion in Section A above admits of no such State power no matter how worthy the goals toward which it is exercised.

Secondly, the challenged laws have no conservational value as admitted by the Appellant who is the Commissioner of Virginia Marine Resources and charged with the enforcement of these enactments. He has conceded that conservation is not affected inasmuch as the predatory practices which have impaired other Virginia fisheries such as herring occur not only beyond Virginia's three-mile jurisdiction but outside the national twelve-mile boundary (Deposition of James E. Douglas, Jr., pp. 24, 27), that both prior to and during the legislative consideration of Virginia Code § 28.1-81.1 (the alienage statute) there had not existed any danger of the invasion of Virginia waters by foreign fishermen through "shell corporations" or otherwise, particularly in light of United States law precluding them, namely 46 U.S.C. § 808 and 16 U.S.C. § 1081 (Deposition, pp. 27-29, 31, 41-43), and that domestic Virginia menhaden fisheries could engage in the most vicious, predatory fishing practices with impunity under these laws (Deposition, pp. 37-38).

Appellant further admitted that the Virginia statutes applied only to the Appellees (Deposition, p. 5), who had heretofore obtained Virginia licenses routinely.

Despite these admissions, the argument is advanced on behalf of Appellant that Virginia's alienage restriction (Code § 28.1-81.1) closes a "loophole" in existing federal legislation by preventing foreign interests from establishing domestic "shell corporations" which in turn acquire

enrolled United States fishing vessels. The difficulty with Appellant's argument is that there is no such "loophole", there is instead a coherent national policy, developed since the earliest days of this nation, that closes all loopholes.

A corporation organized in a State of the United States of which the chief executive officer, the chairman of the board and all directors except a minority of the number necessary to constitute a quorum are United States citizens may document United States fishing vessels, but only if its acquisition of such vessels or the acquisition by aliens of its stock was lawful, that is approved by the Department of Commerce, under 46 U.S.C. §§ 808, 835. Therefore, there is no "loophole" through or any other way around the requirement for Department of Commerce approval of the means by which foreign interests may acquire or document United States flag fishing vessels.* The one described in Appendix C to the brief of the *Amici* is an illusion. Contrary to the statement therein, Hanson Trust Ltd., Appellee's ultimate owner, a U.K. corporation, could not, without complying with 46 U.S.C. § 835(e), sell the stock of corporations owning Seacoast's fishing vessels to a company controlled by Russians.

Under settled principles of Federal supremacy and preemption, the conclusion is compelled that when vessels of a foreign-owned corporation are enrolled into the U.S. fishery by the Federal government as here, the States are not free to wipe out any practical use of that enrollment. *Toomer* v. *Witsell,* 334 U.S. 385, 393, 394 (1948); *United States* v. *California,* 332 U.S. 19 (1947).

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* Such a corporation could not even, without such approval, document a new vessel as a United States fishing vessel. Foreign built vessels cannot be enrolled as fishing vessels 46 U.S.C. §§ 11, 252, 46 C.F.R. § 67.01-5(i), and the transfer to such a corporation of a vessel built in the United States, at whatever stage of construction, would require approval under 46 U.S.C. § 835.

III

The discriminatory Virginia statutes challenged impose an unlawful burden on interstate commerce.

It is clear from the circumstances outlined in the Statement of The Case that the recent "emergency" legislation passed by the Virginia General Assembly (Virginia Code § 28.1-81.1) precluding Appellees from obtaining a menhaden license to fish in the territorial waters of that Commonwealth applies to only one of the three principal menhaden fishers in this country, the two to which it is inapplicable being Zapata Haynie and Standard Products with their menhaden operations based in Virginia. Similarly, the restriction contained in Virgina Code § 28.1-60(3) precluding non-residents from taking menhaden in Chesapeake Bay in practical effect excludes only the Appellees. The anti-competitive and discriminatory effects of these statutes is obvious. As such, they constitute an unjustifiable burden on interstate commerce prohibited by Article I, Section 8 of the United States Constitution.

In adopting this portion of the Constitution, the drafters of that document sought to rid the Union of the commercial provincialism which the contested Virginia legislation represents. As noted by Mr. Justice Cardozo, the Constitution ". . . was framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *Seelig,* 294 U.S. 511, 523 (1935).

In *H. P. Hood & Sons, Inc.* v. *DuMond,* 336 U.S. 525 (1949), the court observed that

> "*Baldwin* v. *Seelig,* 294 U.S. 511, is an explicit, impressive, recent and unanimous condemnation by this Court of economic restraints on interstate commerce for local economic advantage, but it does not stand alone. This Court consistently has rebuffed attempts of states to advance their own commercial interests

by curtailing the movement of articles of commerce, either into or out of the state, while generally supporting their right to impose even burdensome regulations in the interest of local health and safety." 336 U.S. at 535.

There can be no doubt that the menhaden industry constitutes an integral part of interstate commerce in the United States, both in the capture and processing of these fish. The industry employs a large number of people, pays substantial taxes, both State and federal, represents a tremendous investment in the United States economy in terms of dollars and comprises, on the basis at least of tonnage of fish caught and processed, the largest fishing industry in this country.

In the analogous case of *Foster-Fountain Packing Co.* v. *Haydel,* 278 U.S. 1 (1928), the Court noted that while the State of Louisiana could deny the export of shrimp beyond State boundaries and thereby conserve the catch for intrastate consumption, it could not permit exportation of only headless and hulled shrimp thereby favoring its own canning and manufacturing plants.

As with Virginia's menhaden laws,

> ". . . in direct opposition to conservation for intrastate use, this enactment permits all parts of the shrimp to be shipped and sold outside the State. The purpose is not to retain the shrimp for the use of the people of Louisiana; it is to favor the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Biloxi plants. But by permitting its shrimp to be taken and all the products thereof to be shipped and sold in interstate commerce, the State necessarily releases its hold and, as to the shrimp so taken, definitely terminates its control." *Id.* at 13.

Under such circumstances, ". . . the protection of the commerce clause attaches at the time of taking." *Id.*

That the capture of shrimp and other marine fish and the processing and sale thereof constitute "interstate commerce" entitled to the protection described is affirmed by the *Foster-Fountain* decision. *Id.* at 10.

The commerce clause is a limitation on the power of States even in the absence of action by Congress. *Morgan* v. *Virginia,* 328 U.S. 373, 378-79 (1946). If any one of the several States of the United States which border on the Atlantic seaboard may prevent non-citizens from fishing for menhaden within its territorial waters and/or prevent non-residents from fishing for menhaden within certain arms of the sea, collectively all such states have the potential of destroying this industry which is of such national importance. Menhaden have no regard for State boundaries. They spawn primarily in the open ocean, come into Virginia waters as part of a cyclic migration and may visit all of the States from Florida to Massachusetts in their lifetime. It is their nature to move from State to State. The vessels that harvest them must be free to follow. Exclusionary statutes such as Virginia's invite retaliation from other States and countries. Virginia would not be permitted to dam the Chesapeake and prevent the migratory fish there from returning to the sea or visiting other States. Similarly its attempt to wall out non-Virginians from access to the fishing grounds must fail.

IV

The Virginia statutes in dispute deprive appellees of the equal protection of the laws.

Virginia Code § 28.1-81.1 precludes *non-citizens* from obtaining a commercial fishing license for operations within the territorial waters of the Commonwealth.

With regard to State legislation directed against non-citizens, this Court has taken the position that any classifications based upon alienage or non-citizenship ". . . are inherently suspect and subject to close judicial scrutiny."

Graham v. *Richardson,* 403 U.S. 365, 372 (1971). See also *Hirabayashi* v. *United States,* 320 U.S. 81, 100 (1943); *Korematsu* v. *United States,* 323 U.S. 214 (1944); *Takahashi* v. *Fish & Game Comm'n.,* 334 U.S. 410 (1948); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886).

The *Takahashi* decision is particularly relevant in that it involved the denial of a commercial fishing license to non-citizens by the State of California, just as does the challenged Virginia statute. The Supreme Court of California held that the State had such a proprietary interest in the fish in its ocean waters as to bar all non-citizens from catching them. 334 U.S. at 414. This Court rejected that contention and abrogated the statute, observing that non-citizens are entitled to the equal protection afforded by the Fourteenth Amendment (334 U.S. at 415-16), which safeguard applies to "all persons." 334 U.S. at 420. It is to be noted at this point that while corporations are not deemed citizens of the United States so as to afford them the benefits of the "privileges and immunities" clause of the Fourteenth Amendment (*Orient Insurance Company* v. *Daggs,* 172 U.S. 557, 561 [1869]), it has always been held that corporations are entitled to the "equal protection" aspects of that Amendment, as applied in *Takahashi. Grosjean* v. *American Press Co.,* 297 U.S. 233, 244 (1936).

Furthermore, in *Takahashi* the Court concluded that "[t]o whatever extent the fish in the three-mile belt . . . may be 'capable of ownership' by California, . . . that 'ownership' is inadequate to justify . . ." excluding non-citizens from fishing in the ocean while permitting others to do so. 334 U.S. at 421.

Appellant contends that the *Takahashi* holding has been diluted if not overturned by enactment of the Submerged Lands Act, 43 U.S.C. § 1301 *et seq.* But that legislation granted the States no greater right to the lands and resources involved than the States previously enjoyed. "The Act merely confirmed the States' pre-existing rights in the beds of the navigable waterways within their boundaries

by, in effect quitclaiming all federal claims thereto." *Bonelli Cattle Co.* v. *Arizona,* 414 U.S. 313, 318 (1973). The *Takahashi* decision was not premised upon superior title to marine fish in the federal government but held that such wildlife was by nature incapable of such "ownership" as to justify discriminatory legislation like the Virginia statutes in question. State control over these resources must of course comply with all constitutional requirements and must be exercised so as to preserve to all persons lawfully admitted to this country the guarantees of the Fourteenth Amendment.

Furthermore, the Submerged Lands Act specifically reserved to the United States, as to the affected lands, waters and resources, all its rights and powers for the constitutional purposes of commerce and navigation. 43 U.S.C. § 1314 (a). There is nothing in the Submerged Lands Act that restricts the enrollment of vessels in the U.S. fisheries as was done here. This power has not been delegated to the States.

The status of wildlife and state regulation thereof has been considered by the Supreme Court on several other occasions,

> ". . . [b]ut in only one case, *McCready* v. *Virginia,* 94 U.S. 391 (1876), has the Court actually upheld state action discriminating against commercial fishing or hunting by citizens of other States where there were advanced no persuasive independent reasons justifying the discrimination. In that case the Court sanctioned a Virginia statute applied so as to prohibit citizens of other states, but not Virginia citizens, from planting oysters in the tidal waters of the Ware River. The right of Virginians in Virginia waters, the Court said, was 'a property right, and not a mere privilege or immunity of citizenship'. And an analogy was drawn between planting oysters in a river bed and planting

corn in state-owned land." *Toomer* v. *Witsell,* 334 U.S. 385, 400-401 (1948) (footnote omitted).

The *Toomer* case involved a challenge to a South Carolina law regulating commercial shrimp fishing in the three-mile maritime belt off the coast, partly through heavier taxes on non-resident shrimp fishermen. The court outlined the migratory cycle of shrimp which is very similar to that of menhaden, the fishermen in each case following the migration as it moves from the territorial waters of one state to another. 334 U.S. at 387-88. In striking down the statutes, the *Toomer* decision pointed out the reasons why the *McCready* rationale was inapplicable to the shrimp statutes and to the menhaden legislation challenged herein.

> "It will be noted that there are at least two factual distinctions between the present case and the *McCready* case. First, the *McCready* case related to fish which would remain in Virginia until removed by man. The present case, on the other hand, deals with free-swimming fish which migrate through the waters of several States and are off the coast of South Carolina only temporarily. Secondly, the *McCready* case involved regulation of fishing in inland waters, whereas the statute now questioned is directed at regulation of shrimping in the marginal sea.
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> However satisfactorily the ownership theory explains the *McCready* case, the very factors which make the present case distinguishable render that theory but a weak prop for the South Carolina statute. That the shrimp are migratory makes apposite Mr. Justice Holmes' statement in *Missouri* v. *Holland,* 252 U.S. 416, 434 (1920), that 'To put the claim of the State upon title is to lean upon a slender reed. Wild birds are not in the possession of anyone; and possession is the beginning of ownership.' Indeed, only fifteen years after the *McCready* decision, a unanimous Court indicated that the rule of that case might not apply to

> free-swimming fish [citing *Manchester* v. *Massachusetts,* 139 U.S. 240, 265 (1891)]. The fact that it is activity in the three-mile belt which the South Carolina statute regulates is of equal relevance in considering the applicability of the ownership doctrine.
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> The whole ownership theory, in fact, is now generally regarded as but a fiction expressive in legal shorthand of the importance to its people that a State have power to preserve and regulate the exploitation of an important resource. And there is no necessary conflict between that vital policy consideration and the constitutional command that the State exercise that power, like its other powers, so as not to discriminate without reason against citizens of other states." 334 U.S. at 401-02 (footnote omitted).

Thus, any assertion by the State of Virginia that its "ownership" of the migratory menhaden justifies denying Appellees a license because of the alien ownership of the stock of their parent corportion is legally unsound, particularly where the Appellees are domestic corporations, subject to all United States laws.

The sovereignty of the Commonwealth of Virginia also does not encompass the power to deny Appellees, as *non-residents,* the right to follow and catch menhaden in Chesapeake Bay, which body of water is as wide as thirty miles, bordered also by the State of Maryland and separated from its source, the Atlantic Ocean only by a narrow peninsula off the Virginia mainland. The power of Virginia to regulate menhaden fishing therein is certainly not comparable to the State's power to regulate fishing in its inland rivers. *Toomer* v. *Witsell,* 334 U.S. at 401, distinguishing and circumscribing the holding in *McCready* v. *Virginia, supra.*

Particularly relevant to the constitutionality of Virginia's prohibition of non-resident menhaden fishing in Chesapeake Bay (Virginia Code § 28.1-60) is the case of

Edwards v. *Leaver,* 102 F. Supp. 698 (D.R.I. 1952) in which a special three-judge court struck down a Rhode Island statute preventing non-residents from fishing for menhaden north of a line running from Point Judith Light to Brenton Reef Lightship and Sakonnet Light, thus reserving for residents only the opportunity to take menhaden in Narragansett Bay and the Sakonnet River. The factual circumstances thus are indistinguishable from those in this litigation.

Citing *Toomer* v. *Witsell, supra,* the *Edwards* court rejected the contention that the challenged statute represented a proper regulation of Rhode Island inland fisheries and stated:

> "That a discrimination is being made against non-residents is clear from a mere reading of the statute. The magnitude of the discrimination is disclosed by the evidence. It virtually excludes all non-residents from catching or taking with purse net or seine menhaden by denying to them licenses by which they might lawfully engage in such fishing and subjects them to heavy penalties for failure to procure such licenses. No such prohibition exists as to residents of this State. This disparity of treatment between residents and non-residents requires an adequate explanation if the statute is to be sustained as proper exercise of the state's police power.
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> To paraphrase the language of the Supreme Court in the *Toomer* case, . . . The statute must be held unconstitutional unless menhaden fishing in the designated area 'falls within some unexpressed exception to the privileges and immunities clause.' We conclude that the statute does not meet this test.
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> Menhaden are free-swimming fish and as was pointed out in the *Toomer* opinion, the case of *McCready* v. *State of Virginia,* . . . is clearly distinguishable on that fact.

> In view of the discriminatory character of this statute, we do not regard as important the fact that the area designated by the statute may be regarded as inland waters. The important fact is that menhaden are migratory fish. We hold, in accordance with the ruling of the *Toomer* case, that menhaden fishing in the designated area is within the purview of the privileges and immunities clause.
>
> It is of course clear that the corporations here are not citizens within the meaning of the privileges and immunities clause. However, they are persons within the meaning of the equal protection and due process of law clauses. See *Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Providence Journal Co.* v. *McCoy,* D.C., 94 F. Supp. 186, affirmed, 1 Cir., 190 F. 2d 760, certiorari denied 342 U.S. 894, 72 S. Ct. 200. The corporate plaintiffs, therefore, are entitled under the equal protection clause to relief against the discrimination sanctioned by this statute." 102 F. Supp. at 702-703.

Residency fishing statutes like the Virginia enactment have been consistently voided as violative of the constitutional guarantees and a burden on interstate commerce. *Brown* v. *Anderson,* 202 F. Supp. 96, 103 (D. Alaska 1962); *Gospodonovich* v. *Clements,* 108 F. Supp. 234, 237 (E.D. La. 1951); *Russo* v. *Reed,* 93 F. Supp. 554, 559-60 (D. Me. 1950).

In a recent decision of the Supreme Judicial Court of Massachusetts, *Commonwealth* v. *Westcott,* 1976 Mass. Adv. Shts. 696 (March 12, 1976) that Court applied an analysis closely parallel to that of the *Edwards* court and struck down as unconstitutional a Massachusetts statute (Statute 1923, C. 35 as amended by St. 1962, C. 219) which prohibited non-residents from dragging for fish in Vineyand Sound during the months of July, August and September. Charges against the individual defendant were dismissed based on the Court's conclusion that the statute there in question

violated the privileges and immunities clause of the U.S. Constitution and its specific rejection of the Submerged Lands Act argument advanced by Appellants herein.

When tested against long settled principles of constitutional law including the supremacy clause, Federal preemption, unlawful burdens on interstate commerce, or the equal protection clause, it is clear that the two Virginia statutes cannot stand. The decision of the Court below was correct and further briefing and argument are unnecessary. The Virginia laws are simply parochial attempts to protect Virginians from competition in the menhaden fishery despite the conclusion of the Department of Commerce that Appellees could continue to operate their U.S. flag vessels in the pursuit of menhaden in U.S. waters. In the face of clear, long established precedents supporting the decision below, the questions raised by appellants are not substantial.

V

The Federal doctrine of abstention is not applicable where State statutes challenged as unconstitutional admit of no saving construction by State Courts and the enforcement thereof would cause immediate and irreparable injury.

Appellant contends that the lower Court should have abstained in this matter, thereby permitting the Virginia judiciary an opportunity to construe the challenged statutes.

As a basic premise, since the inception of the "abstention doctrine" in *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496 (1941), its application has been held proper "only in narrowly limited 'special circumstances.'" *Zwickler* v. *Koota*, 389 U.S. 241, 248 (1967), quoting *Propper* v. *Clark*, 337 U.S. 472, 492 (1949).

In addition, the judicial precept has been established that where State laws are challenged on constitutional grounds abstention will be resorted to only if such laws are in fact unclear and hence subject to an interpretation

which might resolve the constitutionality question. *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965); *Reetz* v. *Bozanich*, 397 U.S. 82, 86 (1970); *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971). There must be a reasonable probability that the State statute can be interpreted in such a manner as to render it constitutionally sound and ". . . abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim." *Zwickler* v. *Koota*, 389 U.S. at 251.

It is the position of the Appellees that Virginia Code §§ 28.1-60(3) and 28.1-81.1 are, in fact, clear and not subject to any reasonable interpretation, short of complete revision or nullification, which would alter their facial unconstitutionality. The statutes are plainly based upon categorizations according to citizenship and residency, classifications which the Supreme Court has repeatedly held are "inherently suspect and subject to close judicial scrutiny." *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971). Nor do Appellees consider invocation of the abstention doctrine in this instance necessitated by *Reetz* v. *Bozanich*, 397 U.S. 82 (1970), relied upon by Appellant. That case did *not* involve a challenge to a statute facially suspect as the enactment there applied to all persons, resident and non-resident, citizen and non-citizen.

The *Reetz* decision specifically noted that the abstention doctrine is to be applied only where " 'the issue of law is uncertain' " (397 U.S. at 86), citing *Harman* v. *Forssenius*, 380 U.S. 528, 534 (1965). The *Reetz* court also observed that "[t]he instant case is the classic case in that tradition, for here *the nub of the whole controversy may be the state constitution.*" 397 U.S. at 87 (emphasis added). The Court here is not faced with that situation, but rather a challenge, based solely upon federally protected rights, to State statutes which are premised upon inherently suspect classifications and which are not reasonably subject to any construction which would salvage them constitutionally. After *Reetz*, the Supreme Court in the subsequent decision of *Wisconsin* v. *Constantineau*, 400 U.S. 433, 438 (1971), took great pains

to point out that the abstention rule only applies where " 'the issue of state law is uncertain.' " The lower court properly acknowledged that the challenged provisions "flagrantly and patently" offend the Appellees' rights under the Fourteenth Amendment and that where ". . . the deprivation of rights was so severe, clear and damaging as here" the forebearance of federal courts is not demanded. App. at p. 34.

CONCLUSION

For the reasons set forth above, Appellees request that the judgment of the United States District Court for the Eastern District of Virginia rendered herein be affirmed.

Respectfully submitted,

SEACOAST PRODUCTS, INC.,
THE NEW SMITH MEAL COMPANY, INC.,
and
SECOND OCEANIC CORPORATION

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APPENDIX

* * *

FINAL ORDER

Filed November 7, 1975

Upon consideration of the record, including the affidavits filed herein and the stipulations of counsel, as well as of the arguments of counsel orally and on brief, the Court, for the reasons stated in its opinion this day filed, Adjudges, Orders and Decrees:

1. That the motion of the plaintiffs for summary judgment in accordance with the complaint, be and it is hereby, sustained;

2. That the defendant, his successor and successors in office, as well as his agents, servants, employees and attorneys be and each of them is hereby restrained and enjoined from the enforcement against the plaintiffs or any of them of the statutes designated as Code of Virginia, §§ 28.1-60 and 28.1-81.1, in respect to the prohibitions of the plaintiffs to engage in fishing for menhaden in Chesapeake Bay and in the Atlantic Ocean within three miles of the shore of Virginia; and

3. That the plaintiffs recover their costs of the defendant.

/s/ ALBERT V. BRYAN
Senior United States Circuit Judge

/s/ RICHARD B. KELLAM
United States District Judge

/s/ JOHN A. MACKENZIE
United States District Judge

November 7, 1975.

* * *

OPINION OF THE COURT BELOW

Filed November 7, 1975

Albert V. Bryan, Senior Circuit Judge:

In question here is the constitutionality of two Virginia statutes restricting the fishing of menhaden in her part of Chesapeake Bay and in the Atlantic Ocean within three miles[1] of her coast. Plaintiffs, Seacoast Products, Inc., The New Smith Meal Company, Inc., and Second Oceanic Corporation, now and for a number of years engaged in such fishing in these areas, sue the Virginia Commissioner of Marine Resources to have these restrictions declared invalid and to enjoin his imposed enforcement of them.[2] Plaintiffs' motion for summary judgment must be sustained.[3]

The two statutes are Virginia Code § 28.1-60 and § 28.1 81.1. Epitomized, the force of § 28.1-60 is to allow a non-resident a license to fish menhaden "within the three-mile limit" but to exclude *non-residents* of Virginia from menhaden fishing in the Virginia portion of Chesapeake Bay, while at the same time permitting Virginia *residents* to fish for menhaden in that body of water. The force of § 28.1-81.1 is to exclude any fishing by *aliens* within the three-mile limit off the Virginia coast. Thus non-residence and alienage are the determinant factors in the ban of plaintiffs from a piscary for menhaden.

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1 This is known as the 3-mile limit or the jurisdictional belt along the coasts of the ocean bordering States. It was fixed by Secretary of State Thomas Jefferson in 1793 and has been generally accepted internationally. *United States* v. *California*, 332 US 19, 33 (1947).

2 Jurisdiction is rested on complete diversity of citizenship between plaintiffs and defendant as well as on the presence of a Federal question. 28 USC 1331, 1332. That the amount involved is in excess of $10,000, exclusive of interest and costs, is not disputed. A three-judge court has been convened in accordance with 28 USC 2281 and 2284.

3 There are no critical, genuine factual differences between the parties.

The challenged provisions, we conclude, "flagrantly and patently" as well as irreparably offend plaintiffs' rights under the Fourteenth Amendment's equal protection clause and under the preemptive and exclusive Federal regulation of sea fisheries. In this context the doctrines of abstention have no place. In other circumstances they are appropriate: to obtain interpretation of a state statute, *Railroad Commission* v. *Pullman Co.,* 312 US 496 (1941); or to avoid needless interference with the administration of State domestic policies, *Alabama Public Service Commission* v. *Southern Railway Co.,* 341 US 341 (1951); or to avoid obstruction of State prosecutions, *Younger* v. *Harris,* 401 US 37 (1971); but forbearance of Federal judicial action is not demanded when the deprivation of rights is so severe, clear and damaging as here. *Huffman* v. *Pursue,* 420 US 592, 602 (1975); *Younger, supra,* at 53-54; *Zwickler* v. *Koota,* 389 US 241, 248, 249-250 (1967). For the same reasons prior exhaustion of State administrative or judicial remedies is not mandatory. On study of the merits of the complaint we grant the relief it prays.

Plaintiff Seacoast Products is a Delaware chartered corporation with its principal office in New Jersey; Smith Meal is a Massachusetts corporation with its office in New Jersey; and Oceanic is a New York corporation having its principal place of business in that State. The last two corporations are wholly-owned subsidiaries of Seacoast which in turn is ultimately controlled, through subsidiaries, by Hanson Trust Ltd., a corporation organized and existing under the laws of the United Kingdom. For many years the plaintiff parent and subsidiary corporations have been embarked on menhaden seining in Chesapeake Bay and in the Virginia three-mile ocean belt.

Menhaden are not edible by humans. They are ground into fish meal for poultry feed, fish solubles as ingredients of animal feed, and fish oil for the manufacture in Europe and Canada of margarine. Hence the statutes are not proposed to conserve the food supply of the State. It is conceded by

plaintiffs that Virginia could exact from them the same licenses as she required of residents for fisheries in her inland waters. Indeed, plaintiffs have heretofore applied for and been granted the requisite licenses for several years past. However, based on the two Code sections, their applications were denied in May 1975 because of their non-resident status and ultimate British control.

I. Plaintiffs' point is that since the licenses are granted to Virginia domestic and resident corporations but refused non-resident corporations, there is discrimination in contravention of the Fourteenth Amendment assurance of equal protection of the laws. It cannot be successfully gainsaid that this is in actuality the impact of § 28.1-60.

Particularly exampling the discrimination is the licensing of Zapata Haynie Corporation and Standard Products Company, Inc., both resident corporations of Virginia, to fish menhaden in the areas forbidden non-residents. It is alleged, without contradiction, that Zapata is the largest, Seacoast the next largest and Standard the third largest of such fishers.

Supportive of plaintiffs is *Takahashi* v. *Fish and Game Commission,* 334 US 410, 419-20 (1948). It dealt with the denial by a State of a license to a lawfully resident Japanese to earn his living by fishing commercially in ocean waters off her coast. The State action was premised on his ineligibility under Federal law to achieve United States citizenship. In reaching its decision the Court declared the equality in *every* State of all who are lawful residents of *any* State:

> "The Fourteenth Amendment and the laws adopted under its authority thus embody a general policy that all persons lawfully in this country shall abide 'in any state' on any equality of legal privileges with all citizens under non-discriminatory laws."

Incidentally, the Court in both *Takahashi, supra,* at p. 420, and in *Toomer* v. *Witsell,* 334 US 385, 401 (1948) declined

to treat, as *contra, McCready* v. *Virginia,* 94 US 391 (1876) upholding the State statute prohibiting "citizens of other States but not Virginia citizens from planting oysters" in her tidal river waters.

II. The alienage issue, made by the plaintiffs' attack on Virginia Code, § 28.1-81.1, is predicated on the statute's denial of a commercial license to any person, firm or corporation not a citizen of the United States for the taking of any fish from the marginal ocean waters of Virginia. The vitality of that statute, however, has been superseded by an Act of Congress approved May 20, 1964, 78 Stat. 194, 16 USC 1081, *et seq.,* declaring as far as pertinent here that "[i]t is unlawful for any vessel, except a vessel of the United States, or for any master or other person in charge of such a vessel, to engage in the fisheries within the territorial waters of the United States . . .", except upon authorizations not relevant here. In our judgment this legislation preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them. *Toomer* v. *Witsell,* 334 US 385, 393, 394 (1948); *United States* v. *California, supra,* 332 US 19 (1947); *Skiriotes* v. *Florida,* 313 US 69, 75 (1941); *Manchester* v. *Massachusetts,* 139 US 240 (1891).

Subsequently, the United States allowed Seacoast's 68 vessels to be documented unconditionally as vessels of the United States, thus rendering them eligible under 16 USC 1081 to fish within the Virginia 3-mile limit. The acceptance was ordered by the Secretary of Commerce under the provisions of the Shipping Act, 46 USC 808, 839. He acted only after a full hearing, at which competing fisheries opposed the approval because of the British interest in Seacoast.

Although it not an issue here, the evidence is abundant to warrant the documentation. Seacoast is, as heretofore noted, incorporated under the laws of Delaware; it is operated by boards of citizen directors and officers; all the ship officers and crews are also United States citizens.

Clearly, Seacoast and its subsidiaries are lawfully fishing in the Virginia waters despite her proscriptive statute.

However, the State maintains that the statute is essential to the protection of the State's ocean waters against depredations by citizens of foreign countries or their ships. The argument is that the jurisdiction of the Federal government begins at the farther limit of the 3-mile zone and from there extends to the limit of the new 12-mile sovereignty line of the United States. Virginia concludes that, therefore, she has the duty and power to exercise control within the 3-mile limit. We are unable to agree. The decisions heretofore cited—*Toomer, California, Skiriotes* and *Manchester, supra*—determining Federal jurisdiction over the marginal sea to be superior to the rights of the States also declare that the Federal government has paramount authority in the entire marginal belt, including the 3-mile limit. Accordingly, prevention of incursions by foreigners is the responsibility exclusively of the Federal government.

III. Finally, enforcement of the Virginia statutes uncontestably would inflict irreparable injury upon plaintiffs because of the natural habits of menhaden. Migratory fin fishes commonly swimming on the surface in great shoals or schools, they are taken in purse-nets. From January to March they congregate in the far offshore seawaters from North Carolina to Florida. Beginning in March they run northwardly, as far as Cape Cod. They return in the fall and in January move again far out to sea—later to retrace their March-October path. Only in the summer are they to be found just outshore, when and where, obviously, fishing of them is practicable.

Should Virginia press its two statutes—both of which contain severe sanctions for violations—during the summer by the seizure of even one of plaintiffs' ships, since it loads $80,000 worth of menhaden, or by otherwise interrupting plaintiffs' fishing, there would be no recoupment whatsoever for losses occurring during or after the prosecution of the

charges, no matter if plaintiffs prevailed at trial. Catches already made would also be lost for the cargoes are quickly perishable. It is reasonable to assume that any such litigation could last for months, certainly into the summer season. These very facts prove the irreparable injury the Court predicted in *Toomer* v. *Witsell, supra,* 334 US 385, 392 (1948). "[T]he danger of irreparable loss is both great and immediate." *Fenner* v. *Boykin,* 271 US 240, 243 (1926).

Thus plaintiffs' prayer for an injunction, in addition to a declaration of the invalidity of the Virginia statutes, should be granted restraining the continued refusal of the defendant Commissioner to issue the requisite licenses to plaintiffs.

An order will be entered effectuating this opinion.

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STATUTES INVOLVED

Section 28.1-60, Code of Virginia (1950), as amended, found in Volume 5A at page 94.

(1) *Catching fish for oil or guano prohibited.*—No nonresident of this State shall take or catch any fish, in the waters of the Commonwealth, or in the waters under its joint jurisdiction, for the purpose of converting the same into oil, fish scrap, fish meal or guano, except as hereinafter provided; nor shall any nonresident be concerned or interested with any resident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided.

(2) *Resident not to be interested.*—Nor shall any resident of this State be concerned or interested with any nonresident as partner or otherwise, except as a stockholder in a domestic corporation, in taking or

catching fish in any of the waters of this State to be manufactured into oil, fish scrap, fish meal or guano, or in such manufacture, except as hereinafter provided, or knowingly permit any nonresident to use his name for either purpose.

(3) *License for taking menhaden fish.*—A nonresident person, firm or corporation may take or catch the fish known as "menhaden," within the three-mile limit on the seacoast of Virginia and east of a straight line drawn from Cape Charles Lighthouse to Cape Henry Lighthouse for the purpose of converting the same into oil, fish scrap, fish meal or guano between the last Monday of May and the first day of December of each year; provided such person, firm or corporation has applied for and obtained license to take and catch such fish within the above-defined area and in accordance with the following requirements.

(4) *Application for license; affidavit required.*—Such nonresident person, firm or corporation shall apply to the Commissioner of Fisheries for such license, at the office of the Commissioner. Before granting such license the Commissioner shall require the applicant applying for the same to disclose by written affidavit:

(a) The true name or names of the person, persons, firm or corporation owning the purse net, seine, vessel or watercraft, and all the apparatus thereunto belonging, for which the license is desired; and if it be a firm, the true names and addresses of all the members of such firm; and, if a corporation, the location of the principal office and the names and addresses of the officers thereof.

(b) The name of each and every vessel, steamer or other watercraft, and the port in which the same is registered, for which such license is desired.

(c) That during the period of the license the owners and all persons employed by them will not

violate any of the laws of this State in regard to the taking and catching of fish in the waters thereof.

Should the Commissioner of Fisheries be fully satisfied that the statements set forth in the affidavit are true and bona fide he shall then grant a license to such applicant, upon the applicant's payment of the same license fee as set forth for residents in § 28.1-59; provided, that in the event a resident of Virginia would be required to pay higher license fees in the applicant's state, then such applicant shall be required to pay the same license fee in this State which a resident of Virgina would be required to pay in the applicant's state. Nothing in this section shall be construed to permit fishing west of the aforementioned straight line from Cape Charles Lighthouse to Cape Henry Lighthouse.

(5) *Service of process.*—Every such licensee shall by written power of attorney appoint the Secretary of the Commonwealth and his successors in office, its agent, upon whom shall be served all lawful process against or notice to, such licensee, and who shall be authorized to enter an appearance in his behalf. The service shall only be made upon the Secretary of the Commonwealth, or, in his absence, upon the person in charge of his office, and shall be made in duplicate. The provisions of § 8-47 shall not apply to process in any action, suit, or motion against such licensee to be served upon the Secretary of the Commonwealth. A copy of such power of attorney, duly certified and authenticated shall be filed with the Secretary of the Commonwealth, and copies thereof duly certified by him shall be received as evidence in all the courts of this State. No judgment shall be entered against the license until after the process has been served as set forth for at least ten days.

Whenever lawful process against, or notice to, any such nonresident person, firm or corporation shall be

served as hereinabove provided for, the Secretary of the Commonwealth shall forthwith mail a copy of such process or notice to such nonresident person, firm or corporation. For the first process or notice to be so mailed, the Secretary of the Commonwealth shall collect two dollars and fifty cents, and for each additional process or notice to be so mailed the sum of fifty cents, which shall be paid by the plantiff at the time of such service, and the same shall be recovered by him as a part of the taxable costs, if he prevails in the suit or action.

A judgment, decree or order of the court entered or made against any such nonresident person, firm or corporation shall be as valid and binding on such nonresident person, firm or corporation as if such nonresident person, firm or corporation had been a resident and served with process or notice therein.

(6) *Penalty for violation.*—Any person, firm or corporation violating any of the provisions of this section shall be guilty of a misdemeanor.

Section 28.1-81.1, Code of Virginia (1950), as amended, found in Volume 5A, Supplement, at page 29.

(a) No commercial license for the taking of food fish or fish for the manufacture into fish meal, fish oil, fish scrap or other purpose shall be granted to any person not a citizen of the United States, nor to any firm, partnership, or association unless each participant therein shall be a citizen of the United States, nor to any corporation unless the same be a citizen of the United States as hereinafter defined. This requirement shall be in addition to, and not in lieu of, any other requisite to the issuance of a license imposed by this chapter or any other provision of the Code of Virginia as amended from time to time.

(b) Within the meaning of this section, no corporation shall be deemed a citizen of the United States unless seventy-five per centum of the interest therein shall be owned by citizens of the United States and unless its president or other chief executive officer and the chairman of its board of directors are citizens of the United States and unless no more of its directors than a minority of the number necessary to constitute a quorum are noncitizens of the corporation is organized under the laws of the United States or of a state, territory, district, or possession thereof.

(c) Seventy-five per centum of the interest in a corporation shall not be deemed to be owned by citizens of the United States (i) if the title to seventy-five per centum of its stock is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (ii) if seventy-five per centum of the voting power in such corporation is not vested in citizens of the United States; or (iii) if, through any contract or understanding, it is so arranged that more than twenty-five per centum of the voting power in such corporation may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (iv) if by any other means whatsoever control of any interest in the corporation in excess of twenty-five per centum is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

CERTIFICATE OF SERVICE

I, John J. Loflin, Jr., a member of the Bar of the Supreme Court of the United States and one of the counsel for Appellees, in the above-captioned matter, hereby certify that three (3) copies of this Motion to Affirm have been served upon each counsel of record for the parties herein by depositing the same in the United States Postal Office with first class postage prepaid, this 2nd day of April, 1976, as follows:

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All persons required to be served have been served.

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